THANGAVELU v. HOW LOON SIN

[O. C. J. (Sutherland J.) September 28, 1957]

[K. L. — Civil Suit No. 236 of 1957]

Summary procedure — Unconditional leave to defend — When payment into Court should be ordered.

The defendant must not be required to pay into Court the sum mentioned in the Summons or give security unless the Court thinks his defence not to be *prima facie* sustainable or feels reasonable doubt as to its good faith.

CIVIL SUIT.

K. L. Devaser for the plaintiff.

H. Y. Teh for the defendant.

The facts and arguments sufficiently appear from the judgment.

Sutherland J. : — In the course of the proceedings in this Civil Suit, brought by Summary Procedure, the Senior Assistant Registrar granted unconditional leave to defend.

Against that decision the plaintiff appealed. Plaintiff's contention was that defendant's application should be allowed conditionally.

In his plaint, the plaintiff averred that on the 15th of February, 1957, plaintiff and defendant entered into a tenancy agreement about No. 24 Bungsar Road, Kuala Lumpur. By this agreement it was recited that the defendant is the owner of No. 24 (ground floor) and 24A (first floor), Bungsar Road. It was agreed that the plaintiff pay defendant rent at $300 a month at the beginning of every month, first rent to be paid on 1st May, 1957, when the tenancy began. The plaintiff/tenant deposited $5,000 with defendant/landlord for the premises. The tenancy term was indefinite. The plaintiff undertook to give three months notice if he wished to vacate.

The next clause is important. It is that when the plaintiff gives the notice to vacate the said premises the landlord undertakes to refund the said deposit of $5,000 to the plaintiff. The defendant undertook to get the upstairs of the premises now occupied vacated and hand over the possession of the same to the plaintiff on or before 1st May, 1957. The defendant agreed to collect $120 per month for March and April, 1957, for the rent for the downstairs of the premises. If the defendant did not get the upstairs vacated he undertook to pay plaintiff $50 damages for every month until the upstairs is vacated and handed over to plaintiff.

Plaintiff averred that he notified defendant he was terminating the tenancy and demanded refund of deposit of $5,000. In his notice plaintiff asked defendant to deduct $280 being rent for the ground floor (after deducting the damages at the rate of $50 per mensem) for four months, May, June, July and August, 1957, from the deposit of $5,000, and plaintiff asked defendant to pay the balance of $4,720.

The defendant replied that he would not allow plaintiff to deduct any compensation for non-delivery of the upstairs as plaintiff had already refused to take delivery of same when it was offered to him. It would appear that the parties are at issue as to the upstairs of the premises.

Defendant stated that the amount owing by plaintiff from May to August, 1957, would be $480. Defendant promised to refund to plaintiff the deposit of $5,000 less the $480 as soon as plaintiff vacated at the end of August, 1957.

Plaintiff replied that defendant had at no time offered plaintiff the upstairs.

Plaintiff prayed judgment for $4,720 and ancillary relief.

It should be borne in mind that in a summary suit leave to appear may be obtained where it is shewn that there is a defence to the suit on the merits, or that it is reasonable that defendant should be allowed to appear.

Defendant made application that unconditional leave to appear and defend be granted to him. He affirmed that plaintiff had no cause of action against him and had filed suit prematurely. He affirmed that he had a good defence and a good counter-claim against the plaintiff.

Plaintiff in reply stated that the refund is payable at the time the notice to terminate the tenancy is given and not as alleged by the defendant.

Plaintiff also contended that the defence and counter-claim cannot be entertained until defendant gets leave to defend. Plaintiff also contended that the defence and counter-claim are false and made to delay these proceedings.

Plaintiff prayed that defendant's application be allowed conditionally.

At the hearing of defendant's application for unconditional leave to appear and defend, defendant's Counsel stated that by the agreement the landlord

undertakes (and he emphasised this last word) to refund. The landlord does not pay there and then. This is an issue. Clause 6 of the agreement requires the Court's interpretation. The action is premature. Defendant has a counter-claim, and unconditional leave must be given.

Plaintiff's Counsel argued that the landlord undertook to refund the money when he gave notice, not when he vacated the premises.

The learned Registrar held that construction of the agreement lies with the Judge. Plaintiff's Counsel contended that defendant has not a *bona fide* sustainable defence and asked that $4,720 be deposited within ten days.

Defendant's Counsel replied that there is a *bona fide* case to go before the Court.

The Senior Assistant Registrar stated that he was of the considered opinion that the defence is *prima facie* sustainable. He did not feel any reasonable doubt as to its good faith, and he granted unconditional leave to defend.

Section 460 of the Civil Procedure Code states :—

(1) The Court shall, upon application by the defendant give leave to defend the suit, upon the defendant paying into Court the sum mentioned in the summons or upon evidence satisfactory to the Court, which discloses a defence or such facts as the Court may deem sufficient to support the application, and on such terms as to security, framing and recording issues, or otherwise, as the Court thinks fit.

(2) The defendant shall not be required to pay into Court the sum mentioned in the summons or to give security therefor unless the Court thinks his defence not to be *prima facie* sustainable or if there is reasonable doubt as to its good faith.

The Senior Assistant Registrar, after hearing both sides, was of the considered opinion that the defence was *prima facie* sustainable and he did not feel any reasonable doubt as to its good faith. He grounded his decision on the terms of section 460(2) of the Civil Procedure Code. Having arrived at his con clusions, he had no authority to require payment into Court or the giving of security and he granted unconditional leave.

At the hearing of the appeal plaintiff's Counsel argued that the Registrar was wrong to hold there was any defence or that there was good faith. He contended that the Registrar was the Judge as to the construction of the agreement. Defendant's Counsel stated that the object of the deposit was to secure the terms of the tenancy. On completion of the tenancy the deposit was to be refunded. There was three months notice of termination. The tenant cannot have both the tenancy and the deposit. What would happen about damage done to the premises? The Registrar was right. There is a case to go for trial. The plaintiff may get his deposit and then not vacate. This is not reasonable. There is good faith on the part of the defendant. There is a dispute as to the amount which would be due to the plaintiff — the question of $50 per month in respect of upstairs.

Having considered the case for plaintiff/appellant and defendant/respondent respectively, and reminding myself that the defendant must not be required to pay into Court or give security unless the Court thinks his defence not to be *prima facie* (I emphasise *prima facie*) sustainable or feels reasonable doubt as to its good faith, I see no sufficient reason for interfering with the finding and order of the learned Senior Assistant Registrar.

I accordingly dismiss the Appeal with costs to defendant.

Appeal dismissed.

TEJA SINGH v. K. PERIASAMY

[O. C. J. (Smith J.) August 19, 1957]

[Seremban — Originating Summons No. 11 of 1957]

Moneylending — Moneylenders Ordinance, 1951. s. 16 — Delivery of copy of note or memorandum of loan to borrower — Bills of Sale Enactment (Cap. 57).

In this originating summons a registered moneylender applied for leave to realise his security under a registered Bill of Sale granted to him by the respondent. It appeared in evidence that the money was passed before the copy of the Bill of Sale was handed over to the lender.

Held: a moneylender must comply with section 16 of the Moneylenders Ordinance, 1951, even when he is lending money on the security of a properly registered Bill of Sale and, as in this case, the money had been lent before a copy of the Bill of Sale was handed over to the lender. the security given by the lender was unenforceable.

Case referred to :—

(1) *Sadhu Singh v. Sellathurai* (1955) M.L.J. 119.

ORIGINATING SUMMONS.

S. D. K. Peddie for the applicant.

Respondent in person.

Smith J. : — In this originating summons a registered moneylender seeks leave to realise his security under a registered Bill of Sale granted to him by the respondent.